Wan Sagar bin Wan Embong v Harun bin Taib

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)-2 OF 2008-(T)
ALAUDDIN CJ (Malaya), ARIFIN ZAKARIA AND ZULKEFLI FCJJ
16 SEPTEMBER 2008

Election — Petition — Application for declaration that elections were null and void — Struck off by election judge — Appeal against decision — Whether election judge had erred in law in requiring inclusion of evidence in petition — Whether judge had erred in his application of principles on agency in relation to contents of petition — Whether judge had failed to take into account different requirements to prove misconduct under s 32(a) and (c) of the Election Offences Act 1954 — Election Offences Act 1954 s 32(a), (b), (c) — Election Petition Rules 1954 rr 4, 5

The appellant in this case had stood as a candidate for Barisan Nasional in the twelfth general election for the state of Manir held on 8 March 2008 and lost to the respondent, a Parti Islam Se Malaysia candidate, by a majority of 406 votes. Dissatisfied over alleged acts of bribery, corrupt practice, intimidation and non-compliance with the election laws arising from the election held he filed an election petition at the High Court seeking, inter alia, a declaration that the election be declared invalid and void and for a declaration that the respondent was not duly elected or ought not to have been returned at the election. The appellant's petition was based on the grounds set out in s 32(a), (b) and (c) of the Election Offences Act 1954 ('the EOA') read with r 4(1) of the Election Petition Rules 1954 ('the EPR'). According to the particulars furnished by the appellant in the petition it would appear that the petition arose from two incidents which occurred on election day. In the first incident the appellant alleged that the first respondent through his agent or representatives obstructed voters from voting by holding up one registered voter by taking away that voter's wallet which contained his identity card and cash of RM2,000, assaulting that voter and calling him a Bangladeshi. This voter who was prevented from casting his vote on voting day had lodged a police report of the incident at the police station on the same day. The appellant cited this incident to support his claim that the first respondent had directly or indirectly committed acts of undue influence which constituted corrupt or illegal practices under s 32(c) of the EOA. The appellant also relied on the same incident to claim that acts of general intimidation had so extensively prevailed at the Manir state constituency as to have affected the results of the election in that state as to constitute a ground under s 32(a) of

the EOA to declare the election of the constituency void. In the second incident the appellant alleged that a registered voter who had entered the voting place to cast his vote was prevented from casting his vote by two agents or representatives of the Election Commission who had informed the voter that his name on the electoral list had been underlined indicating that he had already voted and was thereby prevented from voting. This according to the appellant constituted a non-compliance with the provisions of a written law and thereby provided a reasonable ground for the election result of the Manir state constituency to be declared null and void under s 32(b) of the EOA. At the hearing of the petition the election judge upheld the preliminary objection raised by the respondent and ordered that the petition be struck out with costs. This was the appellant's appeal against that decision. In his grounds of appeal the appellant contended, inter alia, that the election judge had erred in law in requiring the inclusion of evidence in the petition whereas r 5 of the EPR did not require evidence to be stated in the petition; that the judge had erred in his application of the principles on agency in relation to the contents of the petition; that the judge had erred in relation to the burden of proof in election law; and that the judge had failed to take into account the different requirements to prove misconduct under s 32(a) and (c) of the EOA.

Held, dismissing the appeal with costs:

(1) The election judge had stated that the appellant as the petitioner was obliged to plead in the petition such material facts with particulars to show on the face of the petition that he had cause to complain under one of the five provisions of s 32 of the EOA before his case could be examined on the merits at a full hearing. The election judge had not intended the appellant to plead evidence in his petition but had instead meant for the appellant to have already with him sufficient evidence to present his case at the trial in order for him to be able to sustain the prayer. This was in line with the authorities which state that under the EPR it is a mandatory requirement that a petition must not only state the facts but also the grounds to sustain the prayer and that failure to do so renders the petition defective (see paras 16 & 7).

(2) The election judge had correctly stated that the appellant as the petitioner would be required to state with precision such acts which can be attributed to the first respondent to indicate his culpability and which he would have to verify at the hearing of the petition. This was because it was of vital importance that the petition must disclose a cause of action. Thus, the pleading must state a concise statement of material facts and the fullest possible particulars so as to present a full picture of the cause of action and to make the opposite party understand better

A the case he will have to meet. Moreover, as the pleadings in relation to s 32(c) of the EOA concern 'corrupt practice' the requirements of pleadings are strict (see para 19).

(3) The pleading in the petition filed by the appellant on agency rested on mere conjecture. Although the principles applicable to election law are wider, the principles should not be extended as to cast the net of agency too wide to include even ordinary party supporters. There had to be an element of 'appointment' wherein there is a nexus or connection between the named or identified persons alleged to be the 'agents' and the first respondent as the candidate. The appellant had to plead this to allow the first respondent to meet the case. Therefore, the election judge was correct in requiring the appellant to plead the facts and grounds to show that the corrupt practice was committed, inter alia, by any agent of the first respondent, since the appellant had failed to do so (see paras 20 & 21).

(4) The election judge was correct not to have addressed the issue of burden of proof directly since he was deciding on the preliminary objection raised based on the tested principles and rules of election law. The issue of the first respondent having to prove matters within his peculiar knowledge relate properly to the shifting of the burden during the adduction of evidence at full trial and for the appellant to raise it at this stage where the petition had not proceeded to full trial was premature (see para 23).

(5) The election judge was correct to hold that since the petition under s 32(a) of the EOA alleging intimidation was premised on the same facts, ie the first incident complained about in the petition, and grounds as alleged under s 32(c) they must suffer the same fate. It may be true that different requirements are to be satisfied to show the elements of misconduct under s 32(a) and (c) of the EOA but the facts and grounds relied upon by the appellant were the same, ie the first incident wherein the voter was prevented from voting and unable to vote (see para 24).

[Bahasa Malaysia summary

Perayu dalam kes ini telah bertanding untuk Barisan Nasional dalam pilihanraya umum ke-12 di daerah Manir yang berlangsung pada 8 Mac 2008 dan kalah kepada responden, seorang calon Parti Islam Se Malaysia, dengan undian majoriti 406. Tidak puas hati dengan tuduhan perbuatan rasuah, korup, ugutan dan ketidakpatuhan terhadap undang-undang pilihanraya semasa pilihanraya tersebut, perayu memfailkan petisyen pilihanraya di Mahkamah Tinggi, memohon, inter alia, suatu perisytiharan bahawa pilihanraya tersebut tidak sah dan batal dan juga suatu perisytiharan bahawa responden tidak dipilih atau tidak sepatutnya mempunyai hak untuk

dilapor dipilih. Petisyen perayu berdasarkan alasan-alasan dalam s 32(a), (b) dan (c) Akta Kesalahan Pilihanraya 1954 ('AKP') dibaca bersama Peraturan Petisyen Pilihanraya 1954 (PPP). Menurut butiran yang diberikan oleh perayu, kelihatannya petisyen itu berbangkit daripada dua peristiwa berlaku semasa hari pilihanraya berlangsung. Dalam peristiwa pertama, perayu mendakwa bahawa responden pertama, melalui agen atau wakilnya, menghalang pengundi daripada mengundi, dengan menahan seorang pengundi berdaftar dengan mengambil dompet pengundi itu yang mana di dalamnya ada kad pengenalan dan wang tunai RM2,000, menyerang pengundi itu dan menggelarnya orang Bangladesh. Pengundi ini yang dihalang daripada mengundi pada hari pengundian membuat laporan polis tentang kejadian tersebut di balai polis pada hari yang sama. Perayu merujuk kepada kejadian ini untuk menyokong tuduhannya bahawa responden, secara langsung atau tidak, melakukan tindakan pengaruh tak wajar yang merupakan amalan korup atau salah di sisi undang-undang di bawah s 32(c) AKP. Perayu juga bergantung kepada kejadian yang sama apabila mendakwa tindakan ugutan secara amnya itu amat ketara memberi kesan di kawasan bahagian pilihanraya yang memberi kesan terhadap keputusan pilihanraya di daerah itu yang mana menjadi dasar untuk suatu perisytiharan pilihanraya kawasan itu batal, di bawah s 32(a) AKP. Dalam peristiwa yang kedua pula, perayu mendakwa bahawa seorang pengundi berdaftar yang telah memasuki kawasan undian dihalang mengundi oleh dua agen atau wakil Suruhanjaya Pilihanraya yang mana telah memaklumkan pengundi tersebut bahawa namanya dalam senarai menunjukkan bahawa dia telah pun membuang undi dan oleh itu tidak boleh mengundi sekali lagi. Menurut perayu, ini merupakan ketidakpatuhan terhadap peruntukan-peruntukan undang-undang. Oleh itu, ini merupakan alasan munasabah untuk mengisytiharkan keputusan pilihanraya daerah Manir adalah batal di bawah s 32(b) AKP. Pada pendengaran petisyen, hakim pilihanraya membenarkan bantahan awal yang dibangkitkan oleh responden dan memerintahkan petisyen itu ditolak dengan kos. Perayu merayu terhadap keputusan itu. Dalam alasan rayuannya, perayu berhujah, inter alia, bahawa hakim pilihanraya salah dari segi undang-undang apabila mengkehendaki keterangan dikemukakan sedangkan dalam peraturan 5 PPP tidak mengkehendaki keterangan dinyatakan dalam petisyen; bahawa hakim telah terkhilaf dalam pengaplikasian prinsip-prinsip agensi berkaitan dengan isi kandungan petisyen; bahawa hakim terkhilaf berkenaan beban pembuktian undang-undang pilihanraya; dan juga hakim gagal mengambilkira perbezaan kehendak-kehendak bagi membuktikan salahlaku di bawah s 32(a) dan (c) AKP.

Diputuskan, menolak rayuan dengan kos:

(1) Hakim pilihanraya menyatakan bahawa perayu, sebagai pempetisyen,

wajib menyatakan dalam petisyennya fakta-fakta material dengan butiran-butiran menunjukkan bahawa dia mempunyai kausa untuk mengadu di bawah salah satu daripada lima peruntukan s 32 AKP sebelum kesnya boleh diteliti berdasarkan merit dalam pendengaran penuh. Hakim pilihanraya tidak memerlukan perayu mengemukakan keterangan dalam petisyennya tetapi mahukan perayu mempunyai keterangan yang cukup untuk dikemukakan dalam perbicaraan kelak supaya perayu bisa meneruskan tuntutannya. Ini selaras dengan autoriti-autoriti yang menyatakan bahawa dibawah PPP, adalah satu kehendak mandatori bahawa sesuatu petisyen bukan hanya memerlukan fakta-fakta malah alasan-alasan untuk mengukuhkan tuntutan. Kegagalan melakukan sedemikian akan mengakibatkan petisyen itu tidak sempurna (lihat perenggan 16 & 17).

(2) Hakim pilihanraya secara tepat mengatakan bahawa perayu, sebagai pempetisyen, dikehendaki menyatakan dengan terperinci tindakan-tindakan yang boleh dikaitkan dengan kesalahan responden pertama, dan yang mana dia perlu sahkan semasa pendengaran petisyen tersebut. Ini kerana amatlah penting petisyen tersebut mendedahkan kausa tindakan. Maka, penyataan perayu mestilah menyatakan pernyataan-pernyataan lengkap dan sempurna fakta-fakta yang material dan butiran-butiran penuh agar dapat menggambarkan kausa tindakan yang sempurna dan juga untuk membuatkan pihak lawan lebih faham tentang kes terhadapnya. Tambahan pula, memandangkan pernyataan-pernyataan berkaitan s 32(c) AKP tentang 'amalan korup' kehendak-kehendak terhadap pernyataan adalah tegas (lihat perenggan 19).

(3) Pliding dalam petisyen yang difailkan oleh perayu berkenaan agensi berlandaskan tekaan semata-mata. Walaupun prinsip-prinsip undang-undang pilihanraya adalah luas, prinsip itu tidak seharusnya digunakan untuk menebarkan takrif agensi terlalu luas sehingga kepada penyokong biasa parti. Perlu adanya elemen 'perlantikan' yang mewujudkan hubungan antara individu yang dituduh sebagai 'agen' dan responden pertama yang menjadi calon. Perayu harus menyatakan hal ini agar responden pertama bersedia untuk kes terhadapnya. Hakim pilihanraya membuat keputusan yang tepat apabila mengkehendaki perayu menyatakan fakta-fakta dan alasan-alasan menunjukkan amalan korup, inter alia, oleh agen responden pertama, memandangkan perayu gagal berbuat demikian (lihat perenggan 20 & 21).

(4) Hakim pilihanraya membuat keputusan yang tepat apabila tidak menangani isu beban pembuktian secara langsung kerana dia memutuskan pada peringkat bantahan awal yang dibangkitkan berdasarkan prinsip-prinsip dan peraturan-peraturan undang-undang pilihanraya yang telah pun diuji. Isu bahawa responden pertama perlu

membuktikan perkara-perkara dalam pengetahuan khususnya, berkait dengan pemindahan beban membuktikan semasa mengemukakan keterangan di pendengaran penuh. Adalah terlalu awal bgai perayu untuk membangkitkannya pada peringkat ini, iaitu semasa petisyen tersebut masih belum di peringkat pendengaran penuh (lihat perenggan 23).

(5) Hakim pilihanraya membuat keputusan yang betul apabila memutuskan bahawa memandangkan petisyen di bawah s 32(a) AKP yang mendakwa ugutan berlandaskan fakta yang sama, iaitu peristiwa pertama yang didakwa berlaku dalam petisyen tersebut, dan alasan yang didakwa di bawah s 32(c), haruslah sama kesannya. Mungkin betul bahawa kehendak yang berbeza perlu dipenuhi bagi menunjukkan elemen salahlaku di bawah s 32(a) dan (c) AKP tetapi fakta-fakta dan alasan-alasan yang digunakan oleh perayu adalah sama, iaitu peristiwa pertama di mana pengundi tersebut dihalang daripada mengundi dan tidak boleh mengundi (lihat perenggan 24).]

Notes

For cases on application for declaration that elections were null and void, see *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2006–2012.

Cases referred to

Ali Amberan v Tunku Abdullah [1970] 2 MLJ 15 (refd)

Azhar Hussain v Rajiv Gandhi AIR 1986 SC 1253 (refd)

Dato' Ismail bin Kamus v Pegawai Pengurus Pilihanraya,Zainal Abidin bin Azim & Ors [2005] 3 MLJ 193 (folld)

Devan Nair v Yong Kuan Teik [1967] 1 MLJ 261 (folld)

Gan Joon Zin v Fong Kui Lun & Ors [2004] 4 CLJ 729 (refd)

Harris Mohd Salleh v Ismail bin Majin, The Returning Officer [2002] 3 MLJ 434 (folld)

Laxmi Narayan Nayak v Ramratan Chaturvedi [1990] 2 SCC 1731 (refd)

Muip bin Tabib v Dato' James Wong [1971] 1 MLJ 246 (folld)

Patau Rubis @ Dr Patau Rubis v Patrick Anek Uren & Anor [1984] 1 CLJ 51 (folld)

Taunton case (1869) 1 O'Mal & H 181 (folld)

Wan Daud bin Wan Jusoh v Mohamed bin Haji Ali & Anor [1988] 2 MLJ 384 (folld)

Legislation referred to

Election Offences Act 1954 ss 4(d), 9(1), 32, 32(a), 32(b), 32(c), 34(a)
Election Petition Rules 1954 rr 4(1), 4(1)(b), 5
Election (Conduct of Elections) Regulations 1981 r 14

Appeal from: Election Petition No 03 of 2008 (High Court, Kuala Terengganu)

Firuz Hussein Ahmad Jamaluddin (Mohd Hafarizam Harun, Shem Azraai, Mohd Rafaei Adnan, Julita Ilhari Andul Jabbar, Cheng Mai & Nik Mohd Nasir Nok Hussin with him) (Ahmad Shahabuddin & Co) for the appellant.
Wan Abd Muttalib bin Embong (Mohamad Ari bin Md Yusof, Abd Haris bin Abd Malik, Saifuddin bin Othman, Mohd Zabidi bin Yusof & Mohd Kamaruzaman bin Abd Wahab with him) (Wan Abdul Muttalib & Co) for the respondent.

Zulkefli FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal from the decision of the election judge at the High Court in Kuala Terengganu in which the election petition filed by the appellant [petitioner in the High Court] was struck out following a preliminary objection raised by the first respondent. The appellant was the Barisan Nasional candidate in the 12th General Election for a seat in the State Legislative Assembly for the constituency of Manir, which was held on 8 March 2008 whilst the first respondent was the PAS candidate. The first respondent was declared as the duly elected member of the said constituency of Manir by polling 5,323 against the appellant's 4,917 votes — a majority of 406. The appellant claimed the right to present this petition under s 34(a) of the Election Offences Act 1954 ('EOA') as a person who has the right to be returned or elected at the election. The appellant was dissatisfied over alleged acts of bribery, corrupt practice or illegal practice, violence, intimidation and non-compliance with the election laws arising from the election held and accordingly filed an election petition based on the grounds set out in s 32(a), (b) and (c) of the EOA, read with r 4(1) of the Election Petition Rules 1954 ('EPR'). Section 32(a), (b) and (c) of the EOA reads as follows:

> The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:
>
> (a) that general bribery, general treating or general intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;
>
> (b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;

(c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate.

[2] Rule 4(1) of the EPR reads as follows:

An election petition shall contain the following statements:

(a) it shall state the right of the petitioner within section 34 of the Act; and

(b) it shall state the holding and result of the election and shall briefly state the facts and grounds relied on to sustain the prayer.

[3] Based on the particulars furnished by the appellant in the petition it would appear that the petition arose from two incidents which occurred on election day 8 March 2008. We reproduce below the relevant facts of the two incidents and the complaints made by the appellant:

The first incident

[4] At about 10am at the entrance of the Sekolah Kebangsaan Teluk Menara Polling Centre, on election day 8 March 2008, the first respondent through his agents or representatives consisting of ten Malay persons had attempted to obstruct voters from voting by holding up a registered voter Muhammad Amiruddin Mariappan bin Abdullah. A person from among the group who was wearing a PAS symbol whom the voter recognised as Saidi bin Samad took the voter's wallet which contained his identity card and cash of RM2,000. Another person whom the voter recognised as Faizal AN punched the voter on his left cheek. Yet another whom he also recognised hit him. The voter was accused of being a Bangladeshi.

[5] As a result of the incident the voter was unable to vote on the voting day and a report of the incident was lodged by the voter at the Manir Police Station on the same day vide Report No 000280/08.

[6] In the event the appellant claimed that the first respondent had directly or indirectly, by himself or by any other person on his behalf committed acts of undue influence under s 9(1) of the EOA which constitutes corrupt practice or illegal practice under s 32(c) of the EOA.

[7] On the same facts as described the appellant claimed that acts of general intimidation had so extensively prevailed at the Manir State Constituency that it may be reasonably supposed to have affected the result of the election

thereby constituting a ground under s 32(a) of the EOA to declare the election of the constituency void.

The second incident

[8] At about 2pm on election day 8 March 2008, a registered voter of the constituency Mustaffa bin Yusof went to the voting place at Channel 2 Sekolah Kebangsaan Teluk Menara Polling Centre, Manir for the purpose of voting. While entering the voting place and after handing over his identification card to the agent or representative of the second and the third respondents the voter was informed that his name on the electoral list had been underlined indicating that he had already voted and was thereby prevented from voting.

[9] In the event the appellant claimed that the second respondent as an agent or representative of the Election Commission, the third respondent, had failed to execute his duty in failing to provide Form 11 to the voter to enable him to vote as required under r 14 of the Elections (Conduct of Elections) Regulations 1981 and had thereby willfully prevented a registered voter from voting contrary to s 4(d) of the EOA. The act of the second respondent, election officer, it is contended for the appellant constitutes a non-compliance with the provisions of a written law and thereby provides a reasonable ground for the court to declare the election result of the Manir State Constituency null and void under s 32(b) of the EOA.

[10] Further the appellant claimed that the cumulative effect of the incidents described had given rise to extensive prevalence of general intimidation thereby providing further ground for the court to declare the election of the Manir State Constituency void under s 32(a) of the EOA.

Decision

[11] It is necessary at the outset to state that at the hearing of the petition before the election judge the appellant withdrew his petition against the second and the third respondents with their consent thereby leaving only the petition against the first respondent. Before the learned election judge the first respondent raised a five-point preliminary objection on the petition based on the following grounds:

(i) that the petitioner has not complied with the requirements of r 4(1)(b) of the EPR;

(ii) that the petitioner has failed to properly plead his allegations under s 32(a) and (c) of the EOA;

(iii) that by virtue of the agreement between the petitioner and the second and third respondents to enable the latter to be excluded from the petition, then it is no longer possible for the petitioner to proceed under s 32(b) of the EOA;

(iv) that the petitioner failed to plead the serial number in the electoral roll of the voter named Muhammad Amiruddin Mariappan bin Abdullah;

(v) that the petitioner failed to plead whether the voter named Muhammad Amiruddin Mariappan bin Abdullah in fact had cast his vote on the polling day.

[12] The learned election judge in his judgment amongst others found that only ground (i) read with ground (ii) above are of substance worthy of consideration which requires him to decide whether the appellant as the petitioner has pleaded the facts and grounds necessary to sustain the petition under s 32(a) and s 32(c) of the EOA. We would state here that on this point, we agree with the learned election judge's finding. As regards whether the appellant has pleaded facts and grounds necessary to sustain the petition under s 32(b) of the EOA the learned election judge took the view that any miscreant of the supervising officer in refusing to allow the voter, Mustaffa bin Yusof to exercise his right to vote in the second incident even if proved would not affect the result of the election wherein he relied on the principle laid down by the Federal Court in the case of *Dato' Ismail bin Kamus v Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) & Ors* [2005] 3 MLJ 193.

[13] In the memorandum of appeal filed before this court the appellant has raised fifteen (15) grounds of appeal. However from the submissions and arguments made by learned counsel for both the parties, we find that what need to be decided in this appeal are focused principally on the following five (5) questions;

(i) whether the learned election judge erred in law in requiring the inclusion of 'evidence' in the petition whereas r 5 of the EPR provide that evidence need not be stated in the petition;

(ii) whether the learned election judge had applied the correct principles on the issues of 'agency' in election law in relation to the contents of the petition which showed that the appellant has pleaded that the corrupt practices were committed by the agents of the first respondent and thereby has duly stated the facts and grounds to support the petition under s 32(c) of the EOA;

(iii) whether in relation to 'burden of proof' the learned election judge had failed to recognise that the principles on election law differed from civil law in that under election law the burden of proof rested on both parties;

(iv) whether in relation to the provision of s 32(a) and (c) of the EOA the learned election judge had failed to take into account of the different requirements to prove the alleged misconducts under these two sections; and

(v) whether in relation to the plea of general intimidation under s 32(a) of the EOA the learned election judge failed to recognise that the appellant has pleaded sufficient facts in support and the issue of proof of general intimidation is to be determined only after a full trial.

[14] We also take note that learned counsel for the appellant in his oral submission before us has not addressed us on the issue of whether the appellant has pleaded sufficient facts and grounds necessary to sustain the petition under s 32(b) of the EOA, notwithstanding this issue appears as one of the grounds in the memorandum of appeal. On this issue we take the view that the appellant is not proceeding with this ground. At any rate it is our considered view based on the decision in the case of *Dato' Ismail bin Kamus v Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) & Ors* it is now settled law in Malaysia that if a petitioner pleads infringement of s 32(b) of the EOA he must provide facts and grounds to show that a non-compliance with the provisions of any written law relating to the conduct of an election 'affected the result of the election'. In the present case as far as the pleading based on s 32(b) of the EOA is concerned only one voter was allegedly prevented from voting. In the circumstances we therefore find on this issue the learned election judge was right in his finding that this particular pleading was without merit.

[15] We shall now deal with the above five questions posed for our determination. As regards the first question the thrust of the arguments made by learned counsel for the appellant is that the learned election judge had erred in not properly applying r 4(1) of the EPR. It was submitted that if the learned election judge had carefully considered the pleading it will be wholly apparent that the facts and grounds relied on to sustain the prayer had been adequately pleaded. It was further submitted that the learned election judge in actual fact had struck out the petition on the basis that the appellant had not pleaded evidence in his petition. To make his point learned counsel for the appellant quoted a passage of the judgment of the learned election judge as follows:

> When he presents the petition the petitioner is expected to have possessed sufficient cogent evidence of the involvement of the first respondent to be able to set it out in his petition (see p 24 of the appeal record).

[16] It is the contention of the appellant that from the above statement, the learned election judge had made a fundamental and glaring error of law

because it is expressly stated in r 5 of the EPR that the appellant as the petitioner is not required to plead evidence. Rule 5 of the EPR provides as follows:

> 5. Evidence not to be stated in petition but particulars may be ordered.
>
> Evidence need not be stated in the petition, but the Judge may, upon application in writing by a respondent, order such particulars as may be necessary to prevent surprise and unnecessary expense and to ensure a fair and effectual trial upon such terms as to costs and otherwise as may be ordered.

[17] With respect to the above contention of the appellant, we are of the view that the learned election judge in his judgment had not intended it to mean that the appellant as the petitioner is required to plead evidence in his petition. What the learned election judge meant in our view was for the appellant to have already with him sufficient evidence to present his case at the trial in order for him to be able in the petition filed to set out the facts and grounds relied on to sustain the prayer. The learned election judge had in fact stated that the appellant as the petitioner is obliged to plead in the petition such material facts with such particulars where necessary to show on the face of the petition that he had cause to complain under one of the five provisions of s 32 of the EOA before his case can be examined on the merit at a full hearing.

[18] On the issue of whether the facts and grounds necessary to sustain the petition have properly and adequately been pleaded by the appellant, we are of the view that the learned election judge had made correct conclusions and in line with a long list of authorities, including the decision of the Federal Court in the case of *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729 which states that under the EPR it is a mandatory requirement that a petition must not only state the facts but also the grounds to sustain the prayer and failure to do so renders the petition defective.

[19] Further, *Gan Joon Zin*'s case also approves the principle that a petition must not only narrate the facts complained of but must also relate or associate the complaints with the provision of election laws alleged to have been transgressed. Failure to do so would give the power to an election judge to strike out an election petition in appropriate cases. This court has also approved the decision on these similar points in a number of leading cases cited as follows:

(i) *Patau Rubis @ Dr Patau Rubis v Patrick Anek Uren & Anor* [1984] 1 CLJ 51.

(ii) *Devan Nair v Yong Kuan Teik* [1967] 1 MLJ 261.

(iii) *Wan Daud bin Wan Jusoh v Mohamed bin Haji Ali & Anor* [1988] 2 MLJ 384.

(iv) *Muip bin Tabib v Dato' James Wong* [1971] 1 MLJ 246.

[20] It is our judgment that the learned election judge has not erred in law or in fact in concluding that the appellant has failed to plead sufficient facts and grounds to indicate that the corrupt practice under s 32(c) of the EOA was committed by the first respondent or with his knowledge or consent or by an agent of the first respondent. The learned election judge had correctly stated that the appellant as the petitioner would be required to state with precision such acts or instances which can be attributed to the first respondent to indicate his culpability and which he would have to verify at the hearing of the petition. We are of the view it is of vital importance that the petition must disclose a cause of action. The pleading must state a concise statement of material facts and the fullest possible particulars. The function of particulars is to present a full picture of the cause of action in order to make the opposite party understand the case he will have to meet. We have to also state here that since the pleading in relation to s 32(c) of the EOA concerns 'corrupt practice' the requirements of pleadings are strict. In the case of *Laxmi Narayan Nayak v Ramratan Chaturvedi* [1990] 2 SCC 1731 the court emphasised that the allegation of corrupt practices should not be vague. In the case of *Azhar Hussain v Rajiv Gandhi* AIR 1986 Vol 73 SCI on this same point at pp 1258–1259 the court, inter alia, held as follows:

> In the context of a charge of corrupt practice it would mean that the basic facts which constitute the ingredients of the particular corrupt practice alleged by the petitioner must be specified in order to succeed on the charge.
>
> All the facts which are essential to clothe the petition with complete cause of action must be pleaded and failure to plead even a single material fact would amount to disobedience of the mandate of s 83(1)(a). An election petition therefore can be and must be dismissed if it suffers from any such vice.

[21] On the second question as regards the issue of agency we are of the view the learned election judge is correct to conclude that the fact that a group of ten persons had held up the petitioner, that from amongst them one known to the voter had worn a PAS logo, and yet another in the group was recognised by the voter as the person who punched him, without more, is insufficient to show the culpability of the first respondent in the incident for this may well indicate that they were mere supporters whose acts the first respondent may not have any control of [see p 18 of the supplementary record of appeal]. With respect, we find the pleading in the petition filed by the appellant on agency rests on mere conjecture. Although the principles applicable in election law are wider, we are of the view the principles should not be so extended as to cast the net of agency too wide to include even

ordinary party supporters. The principles as laid down in the case of *Ali Amberan v Tunku Abdullah* [1970] 2 MLJ 15 do not extend that far. Quoting *Taunton*'s case, 182 Raja Azlan Shah J (His Royal Highness as he then was) approved the passage in the judgment reading it as follows:

> The rule of law has long been established that in parliamentary matters we are not to consider the strict rule of common law agency … *it has long been established that where a person has employed an agent for the purpose of procuring his election*, he, the candidate, is responsible for the act of that agent in committing corruption, though himself not only did not intend it but even bona fide did his best to hinder it.
>
> (Emphasis added.)

[22] On the strength of the above authority it is our judgment that there has to be an element of 'appointment' wherein there is a nexus or connection between the named or identified persons alleged to be the 'agents' and the first respondent as the candidate. The appellant has to plead this to allow the first respondent to meet the case. This element of 'appointment' is present in the statement of the law as defined by Raja Azlan Shah J (His Royal Highness as he then was) in the case of *Ali Amberan* at p 18 reproduced as follows:

> Inspired and guided by English and Indian election law I take the view that the rule of extended scope of agency holds good in our election law; and other view would tend to make it impossible to preserve the purity and freedom of elections. Accordingly a candidate at an election is responsible for the acts of agents who are not or would not necessarily be agents under the common law of agency. Therefore a political party and its prominent members who set up the candidate and with his consent, either expressly or by necessary implication, sponsor his cause and work actively to promote his election, may aptly be regarded as 'agents' of the candidate for election purposes.

[23] Based on the factual circumstances of the present case we find the learned election judge is correct in requiring the appellant to plead facts and grounds to show that the corrupt practice was committed, inter alia, by any 'agent' of the first respondent. This, the appellant has failed to do so.

[24] As regards the third question on the issue of burden of proof, we are of the view the learned election judge is correct not to have addressed the issue of burden of proof directly since he was deciding on the preliminary objection raised based on the tested principles and rules of election law. We agree with the submission of learned counsel for the first respondent that where the appellant's pleading falls foul of r 4(1) of the EPR the appellant cannot argue that the burden lies on both parties. The issue of the first respondent having to prove matters within his peculiar knowledge relate properly to the shifting of the burden during the adduction of evidence at full

trial. We are of the view that the decision in *Harris Mohd Salleh v Ismail bin Majin, The Returning Officer* [2002] 3 MLJ 434 which holds that the burden of proof lies on both sides has to be read within this context. We therefore find this particular ground of appeal raised by the appellant at this stage where the petition has not proceeded at full trial is premature.

[25] Finally, we shall deal with the fourth and fifth questions together. The complaint of the appellant as the petitioner is that the learned election judge did not analyse the requirements of s 32(a) of the EOA or consider whether the petition was adequately pleaded in this regard. On this issue of s 32(a) of the EOA we find that the learned election judge is correct to hold that since the petition under s 32(a) of the EOA alleging that acts of intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the election, is premised on the same facts and grounds as alleged under s 32(c) of the EOA, it must therefore suffer the same fate. This issue relating to the requirement of s 32(a) and 32(c) of the EOA was extensively argued before the learned election judge wherein he had made a finding that the pleading fails to state the material facts and grounds to support the claim under s 32(a) and 32(c) of the EOA. It may be true that different requirements are to be satisfied to show the elements of the respective acts of misconduct under s 32(a) and 32(c) of the EOA, but with regard to the facts and grounds relied on by the appellant it has been shown that they were the same — that it relates to the first incident on 8 March 2008 where it was alleged that the voter, Muhammad Amiruddin Mariappan bin Abdullah was prevented from voting and unable to vote.

CONCLUSION

[26] For the reasons above stated it is our unanimous decision that this appeal should be dismissed with costs. We would also order that the deposit be paid out to the first respondent to account for taxed costs and confirm the orders made by the learned election judge.

Appeal dismissed with costs.

Reported by K Nesan